PD-0254-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/5/2018 11:31 AM
Accepted 9/5/2018 11:35 AM
DEANA WILLIAMSON
CLERK

No. PD-0254-18
No. PD-0255-18
No. PD-0265-18

FILED
COURT OF CRIMINAL APPEALS
9/5/2018
DEANA WILLIAMSON, CLERK

IN THE TEXAS COURT OF CRIMINAL APPEALS

CONSOLIDATED PROCEEDINGS

CRAIG DOYAL, CHARLIE RILEY AND MARC DAVENPORT

Appellees,

VS.

THE STATE OF TEXAS

Appellant.

ON DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS DISTRICT OF THE STATE OF TEXAS

CAUSE Nos. 09-17-00123-CR, 09-17-00124-CR & 09-17-00125-CR

APPELLANT'S BRIEF ON THE MERITS

Chris Downey
SBN 00787393
The Downey Law Firm
2814 Hamilton St.
Houston, TX 77004
713-651-0400 (w)
713-395-1311 (f)

David Cunningham
SBN 05234400
Attorney at Law
2814 Hamilton St.
Houston, TX 77004
713-225-0325 (w)

Joseph R. Larsen
SBN 11955425
Gregor | Cassidy, PLLC
700 Louisiana, Suite 3950
Houston, TX 77002
713-306-1937 (w)
832-390-2655 (f)

ATTORNEYS PRO TEM FOR THE STATE OF TEXAS

IDENTITY OF PARTIES

Appellant:

State of Texas

Attorneys for Appellant/State:

Chris Downey
SBN 00787393
The Downey Law Firm
2814 Hamilton St.
Houston, TX 77004
713-651-0400 (w)
713-395-1311 (f)

David Cunningham
SBN 05234400
Attorney at Law
2814 Hamilton
Houston, TX 77004
713-225-0325 (w)
713-391-1311 (f)

Joseph R. Larsen
SBN 11955425
Gregor | Cassidy, PLLC
700 Louisiana, Suite 3950
Houston, TX 77002
713-306-1937 (w)
832-390-2655 (f)

Appellees:	Attorneys for Appellees:
Craig Doyal	Mr. Russell “Rusty” Hardin, Jr. SBN No. 08972800 Ms. Naomi Howard SBN No. 24092541 Rusty Hardin & Assoc., PC 5 Houston Center 1401 McKinney St., Suite 2250 Houston, TX 77010 (713) 652-9000
Charlie Riley	Mr. W. Troy McKinney SBN No. 13725020 Schneider & McKinney, PC 440 Louisiana St., Ste. 800 Houston, TX 77002 (713) 951-9994 Mr. Doug Atkinson SBN No. 24006773 Douglas W. Atkinson & Assoc., PLLC 322 Metcalf St. Conroe, TX 77301 (936) 760-0303
Marc Davenport	Mr. Stephen Jackson SBN No. 00784324 Mr. Michael Matlak SBN No. 24053978 Law Offices of Stephen D. Jackson & Assoc. 215 Simonton St. Conroe, TX 77301 (936) 756-5744

TABLE OF CONTENTS

Page

RECORD AND APPENDIX REFERENCES

All record and appendix items are cited as follows:

"CRD [page]"	Refers to the Clerk's Record in State v. Doyal.
"CRR [page]"	Refers to the Clerk's Record in State v. Riley.
"CRMD [page]"	Refers to the Clerk's Record in State v. Davenport.
"RR(2) [page], [line]"	Refers to the Reporter's Record Volume Two of March 29, 2017.
"RR(3) [page], [line]"	Refers to the Reporter's Record Volume Three of March 30, 2017.
"RR(4) [page], [line]"	Refers to the Reporter's Record Volume Four of March 31, 2017.
"RR(5) [page], [line]"	Refers to the Reporter's Record Volume Five of April 3, 2017.
"RR(6) State Ex. [Ex. No.]"	Refers to the Reporter's Record Volume Six specified State Exhibit.
"RR(6) [Def.] Ex. [Ex. No.]"	Refers to the Reporter's Record Volume Six specified Defendant Exhibit.

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

ISSUES PRESENTED

1. The trial court improperly dismissed the indictments on grounds that the Texas Government Code § 551.143 is subject to strict scrutiny, overly broad and/or unconstitutionally vague.

    a. The Texas Open Meetings Act and sec. 551.143.

    b. Appellee's facial challenge and standard of review.

    c. Section 551.143 governs conduct, not speech.

    d. Section 551.143 does not restrict speech based on its content.

    e. Section 551.143 is not facially overbroad.

    f. Section 551.143 is not unconstitutionally vague.

    g. Prior Legal Challenges to TOMA.

2. Section 551.143 is subject to intermediate scrutiny because it is a disclosure statute and proper constitutional analysis requires qualified access to local government lawmaking.

STATEMENT OF THE CASE

County Judge Craig Doyal and County Commissioner Charley Riley are members of the Montgomery County Commissioners Court. Doyal and Riley each were indicted by a Montgomery County grand jury for violating the Texas Open Meetings Act (hereinafter, "TOMA"). In relevant portion, the indictment alleged "that they, as a members of the Montgomery County Commissioners Court, knowingly conspired to circumvent Title 5, Subtitle A, Chapter 551 of the Texas Government Code (hereinafter referred to as the Texas Open Meetings Act or the Act), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond." (CRD 6, CRR 5).

Marc Davenport is a Conroe-based political consultant. He is not a member of the Commissioners Court. He too was indicted for violating TOMA; however, the Davenport indictment also includes language tracking the party liability provisions of sec. 7.02(a)(2), Tex. Code Crim. Proc. The Davenport indictment alleged, in relevant portion, that he acted "with intent to promote or assist the commission of the offense described herein, solicit, encourage, direct, aid or attempt to aid Doyal, Riley and Commissioner Jim Clark to circumvent Title 5, Subtitle A,

Chapter 551 of the Texas Government Code (hereinafter referred to as the "Texas Open Meetings Act" or the "TOMA"), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond." (CRMD 5).

Appellee Doyal filed his Motion to Dismiss the Indictment on March 20, 2017 (CRD 45-67), and the State filed its Response to Doyal's Motion to Dismiss Indictment on March 21, 2017 (CRD 69-75). Appellees Charlie Riley and Marc Davenport joined in Doyal's Motion to Dismiss Indictment on March 21 and March 22, respectively. (CRR 35-37, CRMD 50-53). In their motion, Appellees presented a facial challenge to the constitutionality of TOMA.

At the urging of Appellees, the trial court conducted a hearing to develop the appellate record solely on the question of the constitutionality of the statute. There was no testimony or other evidence presented concerning the facts that gave rise to the indictments. Rather, the trial court heard testimony from lawyers versed in TOMA and from individual members of various governmental bodies subject to TOMA.

On April 4, 2017 the Court entered its Orders dismissing the indictments, making no findings of fact or conclusions of law. (CRD 79, CRR 42, CRMD 61).

The State filed its notices of appeal in each case on April 19, 2017. (CRD 81, CRR 44, CRMD 63).

The Ninth Court of Appeals issued one published and two memorandum opinions in the cases, each overturning the trial court's orders of dismissal. *State v. Doyal*, 541 S.W.3d 395 (Tex. App.—Beaumont 2017, pet. granted); *State v. Davenport*, 2018 WL 753357 (Tex. App.—Beaumont 2017, pet. granted); and *State v. Riley*, 2018 WL 757037 (Tex. App.—Beaumont 2017, pet. granted).

STATEMENT OF FACTS

No evidence underlying the indictments was presented to the trial court herein as the trial court limited its consideration to a facial constitutional challenge to Tex. Gov't Code § 551.143. Despite this, Appellee Doyal's factual background of his merits brief actually only characterizes his own actions, presented as specific facts, with respect to the indictments, but unsupported by any cites to evidence in the record. To the extent any such facts are in the record, they may be found only in State's Exhibit 10, a summary of the evidence in support of the indictments submitted by the State under seal. (RR(6) State Ex. 10). The experts who testified in this case did not review any of this evidence and did not testify regarding the actual facts underlying the indictments.

With regard to the testimony that was adduced, Appellees called six witnesses: Mr. Alan Bojorquez, a lawyer who represents governmental bodies, principally municipalities (RR(2) 23), Mr. Charles Jessup, mayor of Meadows Place, Texas (RR(2) 222), Mr. Eric Scott, mayor of Brookshire, Texas (RR(2) 257), Ms. Jennifer Riggs, an attorney with practice representing both sides of open government litigation (RR(3) 6), (RR(3) 251), James Kuykendall, mayor of Oak Ridge North, Texas (RR(3) 110), and Charlie Zech, a lawyer who represents governmental bodies (RR(4) 6).

The State called two witnesses: James Rodriguez, a former Houston City Councilmember (RR(5) 6), and Joel White, an attorney with a practice representing media entities and a member of the Freedom of Information Foundation of Texas (RR(5) 61). In addition, the State submitted written testimony from Adrian Garcia, a former Houston City Councilmember and former Harris County Sheriff. (RR(6) State Ex. 9).

Mr. Alan Bojorquez testified that he worked as in-house counsel for the Texas Municipal League ("TML") for several years before forming his own law firm representing governmental bodies. (RR(2) 24). Mr. Bojorquez discussed the Fifth Circuit *Asgeirsson* case[1] which found sec. 551.144 to be constitutional but that "those of us in the industry are looking back going, well we still think it's

[1] *Asgeirsson v. Abbott,* 696 F.3d 454 (5th Cir. 2012).

unconstitutional; but some pretty big lawyers disagree with us, so we need to try to help municipal officials, counties, school district officials comply with it the best we can." (RR(2) 38). After identifying that the purpose of sec. 551.143 is to prevent members of governmental bodies from conspiring to avoid the statute by and when a quorum of members do secret deals outside of the view of the public, outside of the meeting, then this purpose is thwarted, he opined that he thought the statute was "gibberish." (RR(2) 40). Part of his opinion is based on his understanding that the definition of "verbal," as far as he can tell, "is oral, not written." (RR(2) 126-27).

Mr. Bojorquez also testified that typically, if he has "a client who, if they want to avoid the Open Meetings Act, it's not because they want to -- to violate it. It's because they don't want to have to deal with its requirements for various reasons." "[T]hey might talk two on two, or, you know, a mayor may speak to one council member and then another council member and then to a department head or a city manager to discuss an item, not because they want to violate the rule or shield the public. They want to avoid having to comply with one of the Open Meetings Act's requirements that they find burdensome at the moment." (RR(2) 45-46). He advises his clients, "that if you're gathering in groups of less than a quorum for the purposes of avoiding the Open Meetings Act so you can hash something out, beware you might be prosecuted for 143." (RR(2) 53, 9-12). He could testify to no specific scenario of an instance where somebody didn't know what was expected of them

under the statute because it was vague and, in fact, it led to arbitrary or discriminatory enforcement. (RR(2) 155-56). Although stating that sec. 551.143 is ambiguous, he answered a number of hypotheticals of whether certain behavior probably constituted a violation. (RR(2) 94-95, 111-12, 120-21, 143-45, 204-05).

Mr. Bojorquez testified that he thinks TOMA governs verbal communications regarding matters of public business, and he thinks that makes it content-based. When asked if he agreed that the holding in *Asgeirsson* regarding whether TOMA is content-based applied to both sections 551.143 and 551.144, he answered: "Continually." (RR(2) 90). When pressed for the functional difference between sec. 551.143 and sec. 551.144, Mr. Boroquez responded: "A geographic gathering of people in the same place and time or via the Internet." He does not think sec. 551.143 is triggered unless there's a conspiracy and an intent. (RR(2) 142-43). Mr. Bojorquez does not believe that government officials have a constitutional right to discuss public policy among a quorum of their governing body in private. (RR(2) 134).

When asked if he had contributed to the amicus brief by the Texas Municipal League in the *Asgeirsson* case arguing the unconstitutionality of TOMA, he answered he advised that his law firm had filed its own amicus brief. There, they made the same arguments as he made to the trial court below. Mr. Bojorquez conceded the arguments had been rejected by the Fifth Circuit in *Asgeirsson*. (RR(2)

98-99). When Mr. Bojorquez was asked if he had seen the video of the CLE presentation where current TML attorney Scott Houston tells the audience that he still thinks that the Texas Open Meetings Act is unconstitutional and he just doesn't care what the Fifth Circuit says, he responded that he had not seen the video, but that he had a lot of respect for Mr. Houston and had hired him to replace him at TML when left. When asked if Mr. Houston was just giving them advice or scaring them, Mr. Bojorquez responded that: "[H]orror stories and scare tactics can also be a very effective way to teach an audience to be conservative and watch out and avoid problems. I think it's a legitimate tool, and it's one that I have employed myself from time to time." (RR(2) 122-23).

Mr. Jessup, mayor of Meadows Place, testified that he had seen classes held where they say, "don't talk to one another because you're going to end up in jail like those folks out in Alpine." (RR(2) 226, 18). He recounted an incident where at a barbeque party, they noticed that part of a public drainage ditch had sloughed off, and he was discussing options to deal with the situation with a councilmember, and then suddenly they had been joined by two other councilmembers and Mr. Jessup, fearing a potential violation of TOMA, advised them to go back to the party. (RR(2) 227, 23 – 230, 1). Mr. Jessup also testified that he and the councilmembers fear "talking among themselves" because of potential criminal prosecution. (RR(2) 231, 1-4). He further stated that he tries to limit his conversations to just one other

councilmember "to avoid being in the quorum situation." (RR(2) 233, 4-11). Mr. Jessup agreed that the requirement to avoid deliberating as a quorum outside a posted meeting was burdensome, but that it also promoted transparency and he agreed with it. He also agreed that it protected members from being shut out by the majority. (RR(2) 251, 22 – 252, 20).

Mr. Scott, the mayor of Brookshire, testified regarding an example of a situation where he had inadvertently met two council members who were also members of an economic community development board and "immediately took a beeline so that I wasn't seen in a party of three." (RR(2) 263, 6-14). He stated that the "nuance" from sec. 551.143 is that it makes him believe that "people can go to jail very easily" and that "prevents him from doing a better job." (RR(2) 266, 11-16). He also testified that, to comply with sec. 551.143, he tries "never to meet in parties of three" and tries to "avoid conversations where there's more than two people." (RR(2) 270, 6-9). Mr. Scott testified at length as to why he thought sec. 551.143 was confusing, but when presented with the text of the statute with the TOMA definition of "deliberation" plugged into the statute in place of the word "deliberation," he no longer found the statute confusing. (RR(2) 275, 12 – 276, 16).

Ms. Riggs, a former assistant attorney general with a long practice in open government cases on both sides of the docket, testified that, while sec. 551.143 "doesn't focus on the content of the speech. It says this is how you do it, but we're

not going to prevent you from speaking." However, "§ 551.143 applies to a single member" because the statute is written as "a member or members" who conspire. (RR(3) 28:6-10). Ms. Riggs thinks sec. 551.143 is "content-based because it prohibits all speech -- in that very limited circumstance, even with two members or between a member and a member and their constituents, that's all speech." (RR(3) 88, 23 – 89, 1). However, she also testified that she lost a case where her argument was that two county commissioners "doing a briefing" in chambers prior to the meeting was a violation of sec. 551.143. (RR(3) 31, 23 -- 33, 5). Yet, when asked to describe how sec. 551.143 was overbroad with regard to speech covered, she gave the example of a constituent having lunch with two school board members and complaining about the coach. (RR(3) 52, 18 – 53, 18). Ms. Riggs at one point testified that she believed a conspiracy was merely "two or more people trying to reach an agreement." (RR(3) 91, 24 – 92, 2). She did confirm that the legislative intent behind the statute was, in fact, to prohibit the meeting in numbers of less than a quorum to eventually get at a quorum. (RR(3) 172, 5-10). She further agreed that reading the statute this way is the "only way to read it to make it be reasonable." (RR(3) 173, 19-21).

Ms. Riggs is not "aware of any prosecutions" under sec. 551.143. (RR(3) 60, 13). However, in her discussion of prosecutorial discretion, she stated that certain prosecutors will "tell you what the law is" in their particular county. (RR(3) 60, 24

– 61, 4). It is her opinion that sec. 551.143 can be violated "inadvertently." (RR(3) 67, 15; 88, 5). However, she also testified that she believes the reason there are no cases speaking to or challenging this statute is probably because of the difficulty in enforcing it. (RR(3) 101, 13-21).

Ms. Riggs conceded she has handled high profile cases with strongly anti-open government positions (RR(3) 132, 6-8; 138, 8-15; 142, 13 – 143, 3), including providing an expert opinion for a governmental body in an open meetings litigation that she also represented. (RR(3) 133, 14-16; 140-41).

Mr. Kuykendall, the mayor of Oak Ridge North, testified that sec. 551.143 results in him not being able to access information to do his job, and that he has to rely upon others in the administration to provide that to him. (RR(3) 115, 16 – 116, 8). His primary concern with speaking with his constituents is not with sec. 551.143, but with concern that his words will be taken the wrong way. (RR(3) 126, 18 – 128, 1).

Mr. Zech, a lawyer representing governmental bodies, testified generally that he thought sec. 551.143 was confusing, but the only example he gave regarding a potential violation was an instance where the governmental body is properly in session and one member passes a note to another member regarding the prospects of passage of a particular proposal, which he characterized as not "verbal" because it was not a spoken exchange of words. (RR(4) 27, 16 – 28, 4). Mr. Zech said he

believed the members of governmental bodies need rules because sometimes it is the nature of humans to do that which they should not. (RR(4) 38, 21 – 39, 11). He testified that he thought sec. 551.143 was vague, but whether "it rises to a constitutional level is for people smarter" than he is. (RR(4) 44, 9 –24). He testified that he did not recall the definition of "knowingly." (RR(4) 47, 4-9). He has not looked up the definition of "conspiracy" because he does not advise his clients on criminal responsibility. (RR(4) 51, 20 – 52, 3). He ultimately agreed that a conversation that occurs between two members of a public body is not evidence of an attempt to form a quorum. (RR(4) 62, 9-13). Mr. Zech testified that he "has no idea" regarding the law of the parties regarding when a person solicits, encourages, directs, aids, or attempts to aid the other person in the commission of the offense. (RR(4) 64, 10 – 65, 9). He agreed there is no definition in TOMA for the word "meet" (as opposed to "meeting"). (RR(4) 77, 3-6). He agreed that "circumvent" does not mean "violate." (RR(4) 77, 10-25).

Mr. Rodriguez, a former Houston City Councilmember, testified that he understood sec. 551.143 to prohibit meeting in numbers less than a quorum but with the intention of forming a quorum because this would be trying to circumvent a process or circumvent TOMA. (RR(5) 14, 8-19). Mr. Rodriguez never found TOMA to hinder his work as a city council member, his ability to converse with fellow city council members, or that it restricted or inhibited his ability to talk to

constituents, or acted as a hindrance in his ability to discuss possible business. (RR(5) 14, 20 – 15, 10). He testified that meeting with fellow council members was not a violation as long as they were not trying to form a quorum or get a commitment. (RR(5) 30, 22 – 31, 6).

Mr. White testified that TOMA is a disclosure statute because the entire purpose of the statute is to provide transparency in government when the government is conducting public business. He testified that it is content-neutral because it does not discriminate against any particular point of view, it does not advocate a particular point of view on a particular subject, and it does not prohibit discussion of a particular subject. (RR(5) 67, 1-20). He testified that sec. 551.143 is meant to prohibit a knowing conspiracy to meet in groups of less than a quorum in order to have secret deliberations and to eventually reach a quorum. (RR(5) 68, 1-7). Mr. White stated that there is no constitutional right to discuss public business in private. (RR(5) 70, 23 – 71, 2). He testified that the interests supporting TOMA, including sec. 551.143, include transparency, to prevent corruption and exclusion of members outside the majority of a governmental body. (RR(5) 73, 9 – 74, 2). He further testified that to be criminally liable, a third party, for example a reporter, would have to be intentionally aiding or abetting the crime of the members knowingly conspiring to circumvent the chapter by meeting in numbers less than a quorum for the purpose of secret deliberations. (RR(5) 77, 19 – 79, 4). Mr. White testified that there must

necessarily be more than one person for there to be a conspiracy. (RR(5) 110, 20 – 111, 7). He further stated that, while TOMA does not define the word "conspiracy," an ordinary person of reasonable intelligence knows not to participate in a criminal act. And with regard to the term "circumvent" as used in the statute, Mr. White testified that meant "trying to avoid compliance with the requirements of the Act" and trying to read it as "avoid violating" makes no sense. (RR(5) 121, 11 – 122, 4).

Adrian Garcia, former Houston City Councilmember and former Harris County Sheriff, testified in his written comments that he understood sec. 551.143 to mean that it is against Texas law for a member of a city council to purposely meet in numbers less than a quorum in order to conduct a secret meeting of a quorum. He believes this would cover situations like secretly meeting with other members in small but secretly-linked groups or by linking such secret groups through individuals or members serving as intermediaries. He never participated in such activity and, to his knowledge, other city council members did not do so either. He testified that he has been asked by either an individual or another member about how he would vote on a specific issue. When that type of question occurred, he took the inquiry to be more in the form of a person trying to measure support for an issue, and not a purposeful attempt to form a quorum outside of a properly noticed meeting. He did not find that the Texas Open Meetings Act hindered his job as a council member or

"chilled" his ability to communicate with his fellow members or his constituents. (RR(6) State Ex. 9).

SUMMARY OF ARGUMENT

The Texas Open Meetings Act ("TOMA") applies only to a *quorum* of the members of governmental bodies on "public business or public policy over which the governmental body has supervision or control," and does nothing to restrict communications between these elected officials and between any of them and the public outside the procedural constraints imposed by the TOMA statutory structure.

In addition to the salutary and compelling goals of transparency, faith in government, creating an environment where corruption cannot thrive, TOMA also protects the rights as public officials to observe and participate in the public policy making for which they were elected. Without TOMA, a majority of members would have the power to effectively expel the minority from the public policy process altogether.

The constitutionality of TOMA has already been squarely addressed by the Fifth Circuit. Appellees were indicted under a different statute than that directly challenged in *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012). However, the First Amendment arguments and overbreadth arguments are the same for both Tex. Gov't Code § 551.143 and § 551.144, despite Appellees' efforts to effectively rewrite the statute at issue. The argument that sec. 551.143 is vague and ambiguous is also

foreclosed by the analysis in *Asgeirsson.* Texas cases have reached the same conclusions using analysis set out by this Court and applying and citing to *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which Appellees mistakenly claim has changed the First Amendment analysis.

In support of their assertion that sec. 551.143 is vague and ambiguous, Appellees simply produced witnesses who testified that they were confused by the requirements of the statute with no real argument as to how a prosecution could be or has been arbitrary. Further, most of their complaints were with regard to having to comply at all with TOMA and in having to wait three days until there is time to notice a meeting, not with regard to sec. 551.143. Appellees' experts, who are lawyers, give inconsistent reasons for the statute's unconstitutionality, and otherwise testify inconsistently from each other. In any event, these issues are for the Court, the ultimate expert on the law.

Appellees have created a record full of hypotheticals and speculation. They argue that the statute can be arbitrarily enforced, but there have been to date no prosecutions under it because, according to expert Jennifer Riggs, it is difficult for a prosecutor to prove his case under sec. 551.143. (RR(3) 101, 13-21). In other words, there is no indication that there is a substantial number of sec. 551.143 cases that involve persons who are engaging in the legitimate communication of ideas,

opinions, or information. *See, e.g., State v. Stubbs*, 502 S.W.3d 218 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

Appellees' case rests largely on their argument that the level of scrutiny for constitutional review for Tex. Gov't Code § 551.143 can be analyzed separately from the rest of TOMA. They assert that sec. 551.144, which prohibits meetings held without complying with TOMA requirements, is constitutional, but sec. 551.143, which prohibits meeting in numbers less than a quorum, but still deliberating and acting as a quorum, is unconstitutional—even though the speech at issue is the same in both statutes.

Even while attempting to draw this distinction, Appellees argue that *Asgeirsson* has been superseded by a public-forum sign case, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Appellee Doyal's arguments, if accepted, would place the entirety of TOMA under strict scrutiny, certainly dooming it. However, *Reed* does not supersede or abrogate *Asgeirsson*, which found TOMA to be a content-neutral time, place and manner restriction, nor does it abrogate Supreme Court authority such as *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480 (2000), as applied to TOMA and sec. 551.143. In addition, sec. 551.143, like sec. 551.144, reaches private speech, not public speech as in *Reed*.

Further, one does not look at the speech involved in sec. 551.143 to determine if there is a violation, but to determine if it falls within the

regulatory scheme. In the first instance, it is the conduct of the members in knowingly conspiring to circumvent TOMA's requirements by meeting in numbers less than a quorum that determines whether there is a violation, not any protected speech. Even Appellees' expert, Mr. Bojorquez, testified that members of a governmental body do not have a constitutional right to discuss public policy among a quorum of their governing body in private. (RR(2) 134).

Finally, in addition to and independently of the foregoing, sec. 551.143 is a disclosure statute under the analysis of *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), also reviewed under intermediate scrutiny as exacting scrutiny which requires a substantial relationship between a statute's disclosure requirement and a sufficiently important government interest; to withstand such scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.

The court of appeals below held that, as a purely conduct-based regulation, the level of scrutiny is merely to show that the statute is reasonably related to the State's legitimate interest in assuring transparency in public proceedings. *State v. Doyal*, 541 S.W.3d 395, 402 (Tex. App.—Beaumont 2018, pet. granted). However, to the extent the Court finds protected speech is at issue, TOMA, and sec. 551.143, are subject to intermediate scrutiny under every analysis; as a public forum content-neutral time, place and manner restriction; under non-public forum analysis, which

would allow a secondary effects analysis, if *Reed* has eliminated that from a public forum analysis; as a disclosure statute under the authority of *Citizens United*. In addition to the significant interests of transparency, faith in government, and creating an environment where corruption cannot thrive, TOMA also protects the rights as public officials to observe and participate in the public policy making for which they were elected. Without TOMA and sec. 551.143, a majority of members would have the power to expel the minority from the public policy process altogether. By the only reasonable reading of sec. 551.143, it is narrowly tailored to serve these significant goals as it is limited to members of a governmental body who knowingly meet in numbers less than a quorum in order to actually do business as a quorum.

Finally, in connection with TOMA's role as a disclosure statute, rather than *limit* the power of citizens through their elected representatives to pass laws mandating that the official business of a governmental body be done at properly noticed meetings, the First Amendment *requires* a level of access sufficient for the citizenry to perform their vital role of oversight in our system of limited government.

ARGUMENT

I. The trial court improperly dismissed the indictments on grounds that Tex. Gov't Code § 551.143 is subject to strict scrutiny, overly broad and/or unconstitutionally vague.

A. TOMA and Section 551.143.

The Texas Open Meetings Act ("TOMA") applies only to a *quorum* of the members of governmental bodies deliberating and acting on "public business or public policy over which the governmental body has supervision or control," and does nothing to restrict communications between these elected officials, or between any of them and the public, outside the procedural restraints imposed by TOMA's statutory structure. TEX. GOV'T CODE § 551.001(4). TOMA is a regulation of governmental bodies with rulemaking authority and sets forth how they must conduct the business with which they are charged—that is, openly. To insure the effectiveness of this required disclosure of deliberations of governmental bodies, TOMA includes criminal sanctions for public officials who knowingly participate in violations of TOMA.

Appellees contend that these disclosure requirements criminalize almost all communications by members of governmental bodies. However, TOMA requires merely that these elected officials, *as a body*, deliberate matters for which they have the public trust by virtue of their election, in the presence of the public to whom they are accountable. Their actions violate TOMA only to the extent they knowingly act

as a body without providing the public with notice of when and where they will meet and which topics they will address.

TOMA also protects the rights as public officials to observe and participate in the public policy making for which they were elected. Without TOMA, and sec. 551.143 specifically, a majority of members would have the power to effectively expel the minority from the process altogether and thereby turn any public meeting into an empty exercise.

Section 551.143 is one of the two TOMA provisions with criminal penalties for violation of TOMA's openness requirements. It provides that:

> (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Section 551.143 forms a crucial keystone of the Act by prohibiting governmental body members from meeting as a quorum in secret, but disguising this by not physically being present at the same time. Section 551.144 is the other TOMA statute that provides criminal sanctions for conduct that violates openness requirements. It provides that:

> (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
>
> (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;

(2) closes or aids in closing the meeting to the public, if it is a regular meeting; or

(3) participates in the closed meeting, whether it is a regular, special, or called meeting.

That is, sec. 551.144 applies to closed meetings to which no exception to TOMA's requirement of open meetings applies, and includes meeting without the necessary prerequisites, including proper notice. *Martinez v. State*, 879 S.W.2d 54, 55-56 (Tex. Crim. App. 1994). The facts in *Martinez* involve a meeting of a quorum of the Bee County Commissioners Court which simply met and discussed county business with no notice to the public at all. The defendants in that case argued that the subject matter of their deliberations fell within an exception to the requirement of an open meeting, and therefore was no violation. However, this Court rejected that defense because before a governmental body can go into a closed session, it must first meet in a properly noticed meeting and announce in the open portion of the meeting the exception to which it is going into closed session. *Id*.

It is quite clear that a secret meeting such as proscribed in *Martinez* can take place without the members sitting in the same room, and the strictures of sec. 551.144 are easily evaded by splitting the governmental body into parts less than a quorum not physically in each other's presence, but are deliberating and taking action. This is the scenario addressed by sec. 551.143.

Appellees' experts put this into sharp relief, and the fact is, they don't like sec. 551.144 any more than they do sec. 551.143. Mr. Bojorquez has never accepted the Fifth Circuit's opinion upholding sec. 551.143's constitutionality in *Asgeirsson*. His law firm filed an amicus brief before the Fifth Circuit in that case arguing against its constitutionality, as did his successor at the Texas Municipal League, Mr. Scott Houston. He testified specifically that he *still thinks* sec. 551.144 is unconstitutional. (RR(2) 38, 8-9).

In Appellee Doyal's Brief on the Merits, he favorably cites to and quotes from *Mabry v. Union Parish Bd*., 974 So. 2d 787 (La. App. 2d 2008), a case regarding Mabry's claim of a criminal violation under the Louisiana analog to sec. 551.143. *Mabry*, in fact, goes straight to the heart of the issues actually at play in the State's indictments of Appellees. The State *agrees* with the holding in *Mabry* which involves a former superintendent's challenge to the termination of her contract on grounds that the board had actually met and decided the issue in violation of Louisiana's open meetings act through a "walking quorum"—the very activity addressed in sec. 551.143.

Louisiana's definition of a "meeting" is substantively indistinguishable from TOMA's and is defined as

> convening of a quorum of a public body to deliberate or act on a matter over which the public body has supervision, control, jurisdiction, or advisory power. It shall also mean the convening of a public body by a public body or by another public official to [] receive information

> regarding a matter over which the public body has supervision, control, jurisdiction or advisory power.

Id. at 789 (citing La. R.S. 42.4.2). The trial court and court of appeals rejected *Mabry*'s argument, not on *constitutional* grounds, but on *evidentiary* grounds. The court of appeals wrote that: "Generally, in our view, informal discussions between public officials would have to reach a much more structured level with secretive binding force on at least a quorum of the membership before the Open Meetings Law would be implicated—there was no evidence of such in this case." *Id*. at 789-90. The State is prepared to put on just such evidence of a "secretive binding force on at least a quorum" in the indictment against Appellees.

B. Appellees' facial challenge and standard of review.

Whether a statute is facially constitutional is a question of law that the Court reviews *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). Ordinarily, the party challenging the statute carries the burden to establish the statute's unconstitutionality. *Id.* at 15.

The First Amendment—which prohibits laws "abridging the freedom of speech"—limits the government's power to regulate speech based on its substantive content. *Ex parte Flores*, 483 S.W.3d 632, 639 (Tex. App.–Houston [14th Dist.] 2015, pet. ref'd); *see* U.S. Const. amend. I; *Reed v. Town of Gilbert, Ariz.*, —– U.S. ——–, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015). Content-based regulations are those that distinguish favored from disfavored speech based on the idea or

message expressed. *Ex parte Lo*, 424 S.W.3d at 15; *Ex parte Flores*, 483 S.W.3d at 639. Content-based regulations operate to restrict particular viewpoints or public discussion of an entire topic or subject matter. *See Reed*, ––U.S. ––––, 135 S. Ct. at 2229–30. In these situations, the usual presumption of constitutionality is reversed; the content-based statute is presumed invalid, and the State bears the burden to rebut this presumption. *Ex parte Lo*, 424 S.W.3d at 15; *Ex parte Flores*, 483 S.W.3d at 639.

A statute that suppresses, disadvantages, or imposes differential burdens upon speech because of its content is subject to the most exacting or strict scrutiny. *Ex parte Lo*, 424 S.W.3d at 15 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)). Such a regulation may be upheld only if it is necessary to serve a compelling state interest and employs the least speech-restrictive means to achieve its goal. *Id.*

Content-neutral regulation of the time, place, and manner of speech, as well as regulation of speech that can be justified without reference to its content, receives intermediate scrutiny. *Ex parte Flores*, 483 S.W.3d at 639 (citing *Turner Broad. Sys.*, 512 U.S. at 642, 114 S. Ct. 2445, and *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Such a regulation is permissible if it promotes a significant governmental interest and does not burden substantially more speech than necessary to further that interest. *Id.* (citing *McCullen*

v. Coakley, —— U.S. ——, 134 S. Ct. 2518, 2534–35, 189 L. Ed. 2d 502 (2014), and *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014)).

C. Section 551.143 governs conduct, not speech.

As an initial matter, however, it is the State's position that the trial court erred by presuming sec. 551.143 invalid and by applying strict scrutiny because it does not implicate the First Amendment. The statute does not ban speech, but instead only bans conduct, specifically, a governmental body majority's knowing circumvention of TOMA's requirements by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting.

To determine what the statute covers, the courts consider the plain meaning of the acts proscribed by the statute. *See Ex parte Flores*, 483 S.W.3d at 643 (citing *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). The Texas Attorney General and every court to look at this statute have construed sec. 551.143 according to its plain language. Notably, the Attorney General addressed this specific issue and held that:

> The OMA does not require that governmental body members be in each other's physical presence to constitute a quorum. *See* Tex. Gov't Code Ann. § 551.001(6) (Vernon Supp. 2004-05) (defining "quorum" simply as a majority of a governmental body). As such, we construe section 551.143 to apply to members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body. In essence, it means "a daisy chain of

> members the sum of whom constitute a quorum" that meets for secret deliberations. Under this construction, "deliberations" as used in section 551.143 is consistent with its definition in section 551.001 because "meeting in numbers less than a quorum" describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum, *see id*. § 551.001(2).

Tex. Att'y Gen. Op. No. GA-0326 (2005) at 2.

The federal district court in *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 473-76 (W.D. Tex. 2001) found that "meeting in numbers less than a quorum for the purpose of secret deliberations" refers to a quorum or more of a body that attempts to avoid the TOMA's purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting. *Accord, Willmann v. City of San Antonio*, 123 S.W.3d 469, 478 (Tex. App.—San Antonio 2003, pet. denied); Tex. Att'y Gen. Op. No. JC-0307 (2000) at 8; Tex. Att'y Gen. LO-95-055 (1995) at 4; Tex. Att'y Gen. Op. DM-95 (1992) at 4; *see generally*, *Hitt v. Mabry*, 687 S.W.2d 791, 794 (Tex. App.—San Antonio 1985, no writ). In *Esperanza*, San Antonio city council members passed around a consensus memorandum on the city's budget, which a number of council members equaling at least a quorum signed individually, and then adopted the budget reflected in the memorandum at an open meeting without discussing the memorandum's contents. Even Appellees' expert Jennifer Riggs conceded that these actions by the council members of San Antonio

constituted a violation of TOMA. (RR3 71, 13 – 71, 3). This is not the stuff of a facial challenge. The language of the statute is not less "plain" by virtue of the fact that it is a criminal statute. As put by Appellees' expert Jennifer Riggs, reading the statute this way is the "only way to read it to make it be reasonable." (RR(3) 173, 19-21).

Considering the plain text of the statute, the conduct proscribed by sec. 551.143 is certainly connected to and will tend to involve speech. However, such speech is unprotected because it is integral to criminal conduct. Speech integral to criminal conduct has long been recognized as a category of speech that may be prevented and punished without raising a First Amendment problem. *See United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S. Ct. 684, 93 L. Ed. 834 (1949)). Otherwise proscribable criminal conduct does not become protected by the First Amendment simply because the conduct happens to involve the written or spoken word. *See United States v. Alvarez*, —— U.S. ——, 132 S. Ct. 2537, 2544, 183 L. Ed.2d 574 (2012) (plurality op.).

For this analysis, it is useful to analogize sec. 551.143 to sec. 33.021(c) of the Texas Penal Code, which prohibits an actor from using electronic communications to solicit a minor for sex. In *Ex parte Lo*, the Court of Criminal Appeals applied strict scrutiny and concluded that sec. 33.021(b) was unconstitutionally overbroad.

424 S.W.3d at 15-16, 24. However, even though the constitutionality of sec. 33.021(c) was not at issue in *Ex parte Lo*, in dicta the court contrasted subsection (c) to subsection (b) and noted that solicitation statutes have been routinely upheld as constitutional because offers to engage in illegal transactions such as sexual assault of a minor are excluded from First Amendment protection. *See id.* at 16. The court opined that "it is the *conduct* of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense." *Id.* at 16-17 (emphasis in orig.). In other words, although solicitation conduct involves speech, it falls outside the ambit of First Amendment protection because the speech attempts to arrange illegal sex acts with a minor. *See id.* & n.21; *see also Ex parte Wheeler*, 478 S.W.3d 89, 93-94 (Tex. App.–Houston [1st Dist.] 2015, pet. ref'd) (concluding that "section 33.021(c) regulates conduct and unprotected speech").

The court's discussion in *Ex parte Lo* is instructive for the Court's consideration here that sec. 551.143 proscribes conduct involving only unprotected speech.

D. Section 551.143 does not restrict speech based on its content.

Even if the statute reaches some protected speech, sec. 551.143 is content neutral. According to Appellees, sec. 551.143 is content based because it is necessary to look at the content of the speech—whether the discussions of the

members of the governmental body regarded its official business—to decide whether the speaker violated the law. This is incorrect.

Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed*, —— U.S. ——, 135 S. Ct. at 2228. The first step in the analysis is to determine whether the law is content based or content neutral on its face. *See id.* Statutes that "place[ ] a prohibition on discussion of particular topics, while others [are] allowed, [are] constitutionally repugnant." *Hill v. Colorado*, 530 U.S. 703, 722–23, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (discussing *Carey v. Brown*, 447 U.S. 455, 462, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980)), which found "peaceful picketing" statute that "accorded preferential treatment to expression concerning one particular subject matter—labor disputes—while prohibiting discussion of all other issues" was content based).

Nothing on the face of sec. 551.143 indicates that any particular topic or subject matter of speech otherwise would be restricted (or not) more than speech on any other topic or subject matter. *Cf. Boos v. Barry*, 485 U.S. 312, 319, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (concluding that embassy-picketing statute was content based—"the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted"). Unlike

the Texas "improper photography" statute, sec. 21.15(b)(1), and the "sexually explicit communications" provision, sec. 33.021(b), sec. 551.143 on its face does not "most assuredly" discriminate on the basis of an entire topic or subject matter, such as sexual content. *See State v. Stubbs*, 502 S.W.3d 218 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). There is no indication that the statute would effectively result in restricting speech on one subject more than others. Moreover, even if it did, this does not render a facially neutral statute content based. "[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *See McCullen*, ––– U.S. ––––, 134 S. Ct. at 2531 (recognizing "that by limiting the buffer zones to abortion clinics, the Act has the 'inevitable effect' of restricting abortion-related speech more than speech on other subjects" but nevertheless concluding statute was content neutral).

Nor does sec. 551.143 facially discriminate on the basis of any particular viewpoint, an even more blatant and egregious form of content discrimination. *See Reed*, ––– U.S. ––––, 135 S. Ct. at 2230. Appellees never argue sec. 551.143 does so, and the plain text of the statute does not compel such assumption. *See Hill*, 530 U.S. at 723, 120 S. Ct. 2480 ("The Colorado statute's regulation of the location of protests, education, and counseling ... places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker.").

Because the text of sec. 551.143 is facially neutral, the Court would next consider whether the law's justification or purpose otherwise renders it content based. *See Reed*, —— U.S. ——, 135 S. Ct. at 2227–28. In other words, we consider whether the government has adopted a regulation of speech because of disagreement with or distaste for the message it conveys. *See id.* at 2227 (citing *Ward*, 491 U.S. at 791, 109 S. Ct. 2746). The State contends, and the evidence shows that, the Legislature was concerned about the negative impacts of elected officials deliberating the public's business as a quorum out of public view, not that they would deliberate any topic or advocate any position.

Moreover, just because the content of the deliberations may need to be examined does not render the law content based. "It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement." *See Hill*, 530 U.S. at 721, 120 S. Ct. 2480. This is not a situation where the Legislature has proscribed speech in order "to limit discussion of controversial topics and thus to shape the agenda for public debate." *Cf. F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 383, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (enforcement authorities had to examine particular

station management statements to determine whether they concerned "controversial issues of public importance" and therefore constituted proscribed "editorials").

Based on the foregoing, sec. 551.143 is neither content nor viewpoint based. Therefore, the Court does not presume the invalidity of the statute and need not analyze it under strict scrutiny. *See McCullen*, ––U.S. ––––, 134 S. Ct. at 2534.

E. Section 551.143 is not facially overbroad.

When a party challenges a statute as both overbroad and vague, the courts first consider the overbreadth challenge. *See Ex parte Flores*, 483 S.W.3d at 643. A statute or ordinance is facially overbroad if it reaches a substantial amount of constitutionally protected conduct, such as speech or conduct protected by the First Amendment. *See id.* at 642 (citing *Duncantell v. State*, 230 S.W.3d 835, 843 (Tex. App.–Houston [14th Dist.] 2007, pet. ref'd)). The overbreadth doctrine is "strong medicine" to be employed sparingly and only as a last resort. *Id.* (citing *Ex parte Thompson*, 442 S.W.3d at 349). "A statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications." *Id.* at 642-43 (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)); *see Duncantell*, 230 S.W.3d at 843 ("[W]e will not strike down a statute for overbreadth unless there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."). Laws that inhibit the

exercise of First Amendment rights will be held facially overbroad only if the impermissible applications of the law are real and substantial when judged in relation to the statute's plainly legitimate sweep. *See Ex parte Flores*, 483 S.W.3d at 643 (citing *Broadrick v. Okla.*, 413 U.S. 601, 612-15, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)); *see also New York v. Ferber*, 458 U.S. 747, 770, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). "The burden rests upon the person challenging the statute to establish its unconstitutionality." *Ex parte Flores*, 483 S.W.3d at 643 (citing *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002)). The Court must uphold the statute it we can determine a reasonable construction rendering it constitutional. *Id.* (citing *Duncantell*, 230 S.W.3d at 843).

Section 551.143 clearly serves a significant governmental interest. The statute seeks to proscribe avoidance of the requirements of notice and agenda and an open meeting through the expedient of simply never appearing in the same place as a quorum.

Appellees have not met their burden to show that the impermissible applications of the statute are substantial in comparison to its plainly legitimate sweep over unprotected conduct and speech. Although sec. 551.143 was enacted over forty years ago, Appellees admit, and their experts testify, that there have been

no previous prosecutions under it. In other words, there is no indication that a substantial number of sec. 551.143 cases involve persons who are engaging in the legitimate communication of ideas, opinions, or information rather than acting upon and expressing their criminal intent to avoid their obligations under TOMA to deliberate and act as a body in an open meeting. *See State v. Stubbs*, 502 S.W.3d 218, 234 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

Merely imagining some possible unconstitutional applications does not suffice to demonstrate a realistic danger that in fact the statute will be overbroadly applied. *See Ex parte Flores*, 483 S.W.3d at 642-43. Protected, critical speech "could of course be the subject of an as-applied challenge." *See Williams*, 553 U.S. at 302-03, 128 S. Ct. 1830 (possible documentary footage of atrocities of war rape did not render pandering or solicitation of child pornography statute overbroad); *accord United States v. Cassidy*, 814 F. Supp. 2d 574, 583 (D. Md. 2011) (clear that indictment was directed at protected speech criticizing religious leader). However, Appellees only present a facial challenge here. Appellees have not met their burden to establish that sec. 551.143 is facially overbroad.

F. Section 551.143 is not unconstitutionally vague.

The vagueness doctrine is an outgrowth not of the First Amendment, but rather of the Due Process Clause of the Fifth Amendment. *See Williams*, 553 U.S. at 304, 128 S. Ct. 1830. Under the void-for-vagueness doctrine, a statute will be

invalidated if it fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *See State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006). Statutes are not unconstitutionally vague merely because the words or terms employed in the statute are not defined. *See Engelking v. State*, 750 S.W.2d 213, 215 (Tex. Crim. App. 1988). When the words used in a statute are not otherwise defined in the statute, the courts give the words their plain meaning. *See Parker v. State*, 985 S.W.2d 460, 464 (Tex. Crim. App. 1999). Where a vagueness challenge involves First Amendment considerations, a criminal law must: (1) be sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited, (2) establish determinate guidelines for law enforcement, and (3) be sufficiently definite to avoid chilling protected expression. *See Ex parte Flores*, 483 S.W.3d at 643. However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *See Williams*, 553 U.S. at 304, 128 S. Ct. 1830 (quoting *Ward*, 491 U.S. at 794, 109 S. Ct. 2746). Laws do not require mathematical precision, as long as they give fair warning in light of common understanding and are sufficiently definite to avoid arbitrary and erratic enforcement. *See Ex parte Flores*, 483 S.W.3d at 643.

Appellees argue that the statute is unconstitutionally vague and meaningless. One of their experts, Mr. Bojorquez, referred to this section as "gibberish." (RR2 40, 24). However, the meaning of the statute adduced from its "plain

language" by Appellees and their experts is strained and runs from rather than embraces its plain language. Appellees ignore words in the statute, refuse to give words that are in the statute their ordinary meaning, and, under the claim they are looking at the literal meaning of the words of the statute, concoct a nonsensical construction that would render the statute defective.

The interpretations of Appellees' experts would have the Court conclude that "knowingly conspires to circumvent . . . for the purpose of secret deliberations in violation of this chapter" means to actually attempt to *comply* with the chapter by "avoiding" meeting in a quorum. This is purportedly because the word "deliberation" is defined in TOMA as "a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person." This, Appellees posit, requires the physical assembly of a quorum.

Similarly, Appellees argue that the phrase "by meeting in numbers less than a quorum" supposedly makes no sense because TOMA defines "meeting" as "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action." Of course, this is precisely the point. A quorum of members cannot merely facially comply

with the statute by using serial meetings that each fall below a quorum thus not technically a meeting.

The testimony of the fact witnesses doesn't help Appellees' argument. Mayor Charles Jessup of Meadows Place testified that the statute "scares him to death." However, this may be true of a statute that is not substantially overbroad or vague, and is inherent in a statute that brings a criminal penalty. It should also be noted that Mr. Jessup agreed that while the requirement to avoid deliberating as a quorum outside a posted meeting was burdensome, it also promoted transparency, and he agreed with it. He also agreed that TOMA protected members from being shut out by the majority. (RR(2) 251, 22 – 252, 20).

Eric Scott, the mayor of Brookshire, gave the opinion that sec. 551.143 "actually stops good governance." This is irrelevant to the issue and balances the burden of transparent government with efficient government differently than the Legislature. It is merely an opinion. While Mr. Scott testified at length as to why he thought sec. 551.143 was confusing, when presented with the text of the statute with the definition of the TOMA definition of "deliberation" plugged into the statute in place of the word "deliberation," he no longer found the statute confusing. (RR(2) 275, 12 – 276, 16).

Mayor Jim Kuykendall of Oak Ridge North testified that sec. 551.143 "basically neuters everybody" and makes him into "a figurehead." After hearing

about this case, he said he is afraid he may have broken the law, but his testimony gives no detail as to why that might be or what actions he might have taken that put him in legal jeopardy, much less how he could be arbitrarily selected for prosecution. Mr. Kuykendall, however, also testified that his primary concern with speaking with his constituents is not with sec. 551.143, but with concern that his words will be taken the wrong way. (RR(3) 126, 18 – 128, 1).

State's witness, former Houston City Councilmember James Rodriguez, stated that he has never "knowingly" been a part of a "rolling quorum"; he repeatedly used the term "err on the side of caution" because he doesn't want to be charged with a TOMA crime. Of course, "knowingly" is the requisite culpable mental state to be liable under sec. 551.143. Indeed, Mr. Rodriguez also testified that he never found TOMA to (a) hinder his work as a city council member; (b) limit his ability to converse with fellow city council members; (c) restrict or inhibit his ability to talk to constituents; or (d) hinder his ability to discuss possible business. (RR(5) 14, 20 – 15, 10). He testified that meeting with fellow council members was not a violation as long as they were not trying to form a quorum or get a commitment. (RR(5) 30, 22 – 31, 6).

None of the witnesses testified that they are attempting to avoid TOMA's requirements by meeting in numbers of less than a quorum with their fellow city council members or constituents. Section 551.143 is violated when "a quorum or

more of a body [. . .] attempts to avoid [TOMA's] purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting." *Esperanza*, 316 F. Supp. 2d at 473. TOMA is not violated when a member of a governmental body uses the telephone to discuss an agenda for future meetings with another member, so long as a quorum is not present and the telephone conversation is not used to circumvent the Act. *Harris Cnty. Emergency Serv. Dist. No. 1 v. Harris Cnty. Emergency Corps*, 999 S.W.2d 163, 168-69 (Tex. App.—Houston [14 Dist.] 1999, no pet). Unless the witnesses or their clients "knowingly conspire [. . .] to circumvent" TOMA, they do not violate TOMA when they communicate with their fellow city council members or constituents *ex parte* or one-on-one by phone or e-mail about public business outside of a quorum. TOMA is not impermissibly vague in all of its applications; rather, TOMA sets forth a core of prohibited conduct with sufficient definiteness to guide those who must interpret it.

In sum, Appellees' arguments on vagueness and overbreadth resemble one of those early flying machines that are wonderfully elaborate but never get off the ground.

G. Prior TOMA challenge—*Asgeirsson*'s holdings.

Appellees strenuously argue that TOMA must satisfy strict scrutiny because it "regulates speech." However, *Asgeirsson* concludes on three different grounds that TOMA is subject to intermediate scrutiny.

To the extent it can even be said that TOMA restricts the speech of the members of Texas' governmental bodies at all, it is undoubtedly a reasonable time, place and manner restriction. TOMA is completely consistent with the Supreme Court's definition of "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771 (1976); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

TOMA does not contravene the fundamental principle that underlies concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Indeed, TOMA, similar to the ordinance at issue in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is not directed to the content of speech even in the broad sense, but to the adverse secondary effects

of closed government: corruption, disenfranchisement of the public, and lack of accountability. *See id.* at 48-49.

Reed in no way supersedes or diminishes the opinion in *Asgeirsson*. To the extent *Reed* can be said more restrictive in its handling of content-based analysis than the well-established precedent it cites in support of its holding, this is best analyzed by looking at the distinction between public and private speech. One of the principal distinctions between *Asgeirsson* and *Reed* is focused on speech at a "traditional public forum."

Asgeirsson held that concerns raised regarding suppression of public speech *are not implicated* by TOMA. For example, *Asgeirsson* rejected the plaintiffs' argument that TOMA was unconstitutional under the holding in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), in which the Supreme Court struck down a statute restricting the political donations of corporations and labor unions. *Asgeirsson* held TOMA

> does not apply to government officials because of any hostility to their views. Rather, only *private speech* by government officials lessens government transparency, facilitates corruption, and reduces confidence in government. Therefore, the identity-based application of the statute is not evidence of a content-based purpose.

Asgeirsson, 696 F.3d at 462 (emphasis added). Rather, the concern in *Citizens United* was:

> about public attitudes toward particular ideas and speakers. It is aimed at regulations that keep speech from reaching the marketplace of ideas,

> and it is therefore inapplicable to statutes that restrict only *private speech*. Thus, TOMA's application to only members of public bodies does not raise either of the concerns expressed in *Citizens United*.
>
> Accordingly, TOMA is a content-neutral time, place, or manner restriction, and as such, it should be subjected to intermediate scrutiny.

Id. (emphasis added).

The citizens who have elected the Appellees and members of other governmental bodies are entitled to set conditions by which they will serve their mandates. As the ultimate decision-makers in our representative form of limited government, the public may demand that its business be done in a way that gives the voters sufficient knowledge regarding how these elected officials have discharged their duties. That is, these elected officials, *in their elected capacities*, are not acting or speaking solely in their own rights, but as representatives of the voters. This is the key idea behind the ideal of limited government.

If a majority of their constituents disagrees with the positions taken by any or all of these elected officials, or feels they are not acting with sufficient force for the public good, the constituents' options are not limited to writing an op-ed piece, to picketing or public demonstration or the other typical means by which the First Amendment promotes resolution of issues in the marketplace of ideas, but include the power to remove these officials through the normal process of elections or, in case of acute breach of the public trust, by seeking removal of the elected official(s) prior to an election.

Indeed, Appellees' arguments, if accepted, would lead to the insulation of these elected officials from the constituency they represent. It would subvert the power of the voters to compel their own representatives to handle the business for which they were elected in meetings where these voters may attend and observe. In fact, the public seeks only to know what these officials say and do when acting as a governmental body. The implications of subjecting TOMA to strict scrutiny are grave, to say the least, and would mark a significant milestone in placing government in the hands of special interests whose influence and activities are most effective when they never see sunlight.

II. Section 551.143 is subject to intermediate scrutiny because it is a disclosure statute.

Asgeirsson also found that *Citizens United's* separate holding regarding disclosure statutes provides an independent basis for finding TOMA is subject to intermediate scrutiny and constitutional. *Asgeirsson*'s discussion in this connection bears repeating in full:

> For First Amendment purposes, the requirement to make information public is treated more leniently than are other speech regulations. The Court has often upheld disclosure provisions even where it has struck down other regulations of speech in the same statutes. *See, e.g., Citizens United*, 130 S.Ct. at 914; *Buckley v. Valeo*, 424 U.S. 1, 68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). And the Court has generally upheld disclosure requirements that are unlikely to subject the speaker to harassment or persecution. *See e.g., United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *Doe # 1 v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 2818–21, 177 L.Ed.2d 493 (2010). The justification is that

> disclosure requirements are less effective in suppressing the underlying ideas of the speech that is burdened.
>
> In *Citizens United*, the Court upheld the portions of the Bipartisan Campaign Reform Act ("BCRA") that required political advertisements to contain disclaimers indicating who paid for them. *Id*. Because the Court classified the statute as a disclosure requirement, it subjected it to exacting rather than strict scrutiny. *Id*. The Court reasoned that disclosure requirements do not prevent individuals from speaking even if they burden the ability to speak. *Id*. As with the BCRA, TOMA burdens the ability to speak by requiring disclosure. TOMA's disclosure requirement burdens private political speech among a quorum of a governing body, but it does so in the same way that the BCRA's disclosure requirement burdened anonymous political speech in political advertisements. Neither statute aims to suppress the underlying ideas or messages, and they arguably magnify the ideas and messages by requiring their disclosure.
>
> Plaintiffs contend that because TOMA punishes *private speech*, it does not merely require disclosure. That is a distinction without a difference: To enforce a disclosure requirement of certain speech, the government must have the ability to punish its nondisclosure. If there were no punishment for nondisclosure, the speaker would have no incentive to disclose until the enforcer of the statute prosecuted him or obtained an injunction. That would render any disclosure requirement so arduous to enforce that it would be ineffective.

Id. at 462-63 (emphasis added).

By arguing that a statutory framework requiring a governmental body to openly deliberate regarding "public business or public policy over which the governmental body has supervision or control" is directed at the "content" of the speech of the members of these bodies, and TOMA therefore to strict scrutiny, the Appellees have sidestepped proper application of First Amendment jurisprudence. In fact, the First Amendment *requires* informed access to the workings of

government. These First Amendment principles undergird TOMA's disclosure requirements.

There is nothing in the language of the First Amendment itself from which a right of public access to legislative and rule-making proceedings may automatically be inferred. Nonetheless, the existence of the right in question can be readily recognized once the rationale of Supreme Court decisions is clearly understood. Much of the applicable case law has concerned the public's, or the media's, access to judicial, and in particular criminal, proceedings. The landmark Supreme Court case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), established that a criminal trial must, except under certain limited conditions, be open to the public. The *Richmond Newspapers* court was called upon to decide if a trial court had acted properly when, without considering less restrictive alternatives, it granted defense counsel's motion to close the trial to the public. The court held that the judge's action violated the First and Fourteenth Amendments. It explained:

> The First Amendment, in conjunction with the Fourteenth, prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id. at 575.

Passages such as this abound in *Richmond Newspapers* and make clear that it is a case about access not only to criminal trials, but equally to "matters relating to

the functioning of government." Access to criminal trials is but a special case of a right to be informed about government which the court held to be included in the First Amendment.

That *Richmond Newspapers* applies to legislative and rule-making proceedings as well as court proceedings is evidenced by the elaborations to be found in its concurring opinions. Justice Stevens viewed the majority as having denounced "arbitrary" interferences with First Amendment rights. He stated:

> Today ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

Id. at 583.

It is apparent as well from Justice Brennan's concurrence that he understood the significance of the case to extend far beyond the matter of access to criminal trials. In characterizing what he termed the "structural" role played by the First Amendment "in securing and fostering our republican form of government," Brennan indicated that freedom of communication in general is of chief concern:

> Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate--as well as other civic behavior--must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive,

> and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. at 588.

Subsequent Supreme Court decisions reinforce the conclusion that a First Amendment right of access extends well beyond access to criminal trials. Although most of those decisions have dealt chiefly with press or public access to criminal trials in particular, a concern for access to information about government generally informed the decisions. This concern, indeed, is typically invoked as the major premise from which the right of access to criminal trials may be inferred. Thus, in *Globe Newspaper Co. v. Superior Ct*, 457 U.S. 596 (1982), the Supreme Court justified its freedom-of-access conclusion by saying that "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id*. at 604-05, 102 S. Ct. at 2619.

The Supreme Court's enunciation of the notion of a "qualified First Amendment right," and of the special circumstances in which alone the right may be defeated, is restated and reinforced in later decisions. *Globe Newspapers* made clear that

> the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must

> be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-07. Then, in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), where the court specifically extended the public's right of access to include *voir dire* examinations of prospective jurors, it spoke of a "presumption of openness" that could be rebutted only by adducing strong, countervailing concerns. The court added:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

With these decisions in mind, can it be doubted that public access to legislative and rule-making meetings would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government? Applying the "historical" and "functional" tests enunciated in *Globe Newspapers*, each is satisfied in the same degree by legislative as by judicial proceedings. The historical test is met because Texas' legislative and rule-making proceedings have traditionally been open to the public. Applying the functional test, the effect of holding open meetings would be salutary and the benefits would be several. Indeed, virtually all of the advantages of openness which courts have found in regard to judicial proceedings, both criminal and civil, are equally applicable to the legislative process. These include the following:

(a) The integrity of the fact-finding process is enhanced by open proceedings.

(b) Public respect for the legislative process is increased by open proceedings.

(c) Open proceedings provide a "therapeutic outlet."

(d) The ability of the public to engage in informed discussion of governmental affairs, to cast an informed ballot, and ultimately to improve our system of self-government are all enhanced by open proceedings.

The deliberations of and actions taken by these governmental bodies *is* governmental information to which the public has a qualified First Amendment right of access. Appellants' argument makes no mention of this jurisprudence, and essentially turns it on its head, placing the burden on the citizens and voters of Texas to prove TOMA is the least restrictive means to serve a compelling state interest instead of finding that only a compelling interest would serve to *restrict* access to this information of fundamental importance to self-government. Appellants attempt to evade the salutary rulings by the U.S. Supreme Court in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), and *Doe v. Reed*, 130 S. Ct. 2811 (2010), by blankly claiming that TOMA "is not a disclosure statute" when that is precisely what it is. Analysis of this case is on point with the analysis in *Citizens United* that knowing *who* is making the expenditures (speech) can provide "citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Citizens United*, 130 S. Ct. at 916. The requirement that

the deliberations and actions of a governmental body take place at a scheduled meeting is nothing more than a requirement that citizens be able to see what position their elected officials take when acting in their official capacity—the very essence of disclosure.

TOMA, and sec. 551.143, are subject to intermediate scrutiny under every analysis; as a public forum content-neutral time, place and manner restriction; under non-public forum analysis, which would allow a secondary effects analysis, if *Reed* has eliminated that from a public forum analysis; and, as a disclosure statue under the authority of *Citizens United*.

The issue of the level of scrutiny was directly decided by the Fifth Circuit for sec. 551.144 in *Asgeirsson*, and the same result, intermediate scrutiny, must follow for sec. 551.143. *Reed* has not changed that.

The same significant interests support each section. In addition to the salutary and compelling goals of transparency, faith in government, and creating an environment where corruption cannot thrive, TOMA also protects the rights as public officials to observe and participate in the public policy making for which they were elected. Without TOMA, a majority of members would have the power to expel the minority from the public policy process altogether. These are abundantly supported by the Record, have been conceded by Appellees, and were at issue in *Asgeirsson*. By the only reasonable reading of sec. 551.143, it is narrowly tailored

to serve these significant goals. It is limited to members of a governmental body who knowingly meet in numbers less than a quorum in order to actually do business as a quorum. This is virtually indistinguishable from the function of sec. 551.144 which prevents these members from simply meeting in the same physical location without giving notice to the public, and effectively penalizes accomplishing the same objective by simply breaking down the quorum into communicating parts.

Indeed, rather than limit the government's ability to provide access to the workings of its governmental bodies through requiring business be done at properly noticed meetings, the First Amendment requires a level of access sufficient for the citizenry to perform their vital role of oversight in our system of limited government.

CONCLUSION AND PRAYER

A nation founded on the principle of government of the people, by the people and for the people necessarily requires that government be conducted in view of the people. This theory of government runs back to our founding fathers and is the bedrock on which this nation is built. The First Amendment supports this right of the people for open, limited government and the Texas Open Meetings Act was passed to provide a legislative framework to ensure that governmental bodies in Texas meet their constitutional duty to do business in the light of day.

Appellees' arguments and their witnesses' testimony do not raise a successful facial challenge to Texas Gov't Code sec. 551.143, a keystone provision of the Texas Open Meetings Act.

Appellant prays the Court to enter an opinion reversing the trial court's order dismissing these cases and for all other relief to which it may show itself entitled and as the Court deems appropriate.

Respectfully submitted,

/s/ Chris Downey
Chris Downey
SBN 00787393
THE DOWNEY LAW FIRM
2814 Hamilton St.
Houston, TX 77004
(713) 651-0400 (w)
(713) 395-1311 (f)
chris@downeylawfirm.com

/s/ David Cunningham
David Cunningham
SBN 05234400
ATTORNEY AT LAW
2814 Hamilton St.
Houston, TX 77004
(713) 225-0325 (w)
(713) 395-1311 (f)
cunningham709@yahoo.com

/s/ Joseph R. Larsen
Joseph R. Larsen
SBN 11955425
GREGOR | CASSIDY, PLLC
700 Louisiana, Suite 3950
Houston, TX 77002
(713) 306-1937 (w)
(832) 390-2655 (f)
jlarsen@gcfirm.com

ATTORNEYS PRO TEM FOR
APPELLANT STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that on August 21, 2018, I caused to be electronically filed the foregoing Appellant's Brief with the Clerk of the Court through an electronic service provider which will send notification of such filing to all counsel of record as noted below:

Mr. Russell "Rusty" Hardin, Jr.
Ms. Naomi Howard
RUSTY HARDIN & ASSOC, PC
1401 McKinney St., Ste. 2250
Houston, TX 77010

Mr. Stephen Jackson
Mr. Michael Matlak
LAW OFFICES OF STEPHEN D. JACKSON & ASSOCIATES
215 Simonton St.
Conroe, TX 77301

Mr. W. Troy McKinney
SCHNEIDER & MCKINNEY, PC
440 Louisiana St., Ste. 800
Houston, TX 77002

Mr. Doug Atkinson
DOUGLAS W. ATKINSON AND ASSOCIATES, PLLC
322 Metcalf Street
Conroe, TX 77301

Andrew Davis
Assistant Solicitor General of Texas
Andrew.Davis@oag.texas.gov

/s/ Joseph R. Larsen
Joseph R. Larsen

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was prepared using Microsoft Word in Times New Roman, 14 point font; the word-count function shows that, excluding those sections exempted under TRAP 9.4(i)(1). The brief contains 12,779 words.

/s/ Joseph R. Larsen
Joseph R. Larsen